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No. 97-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

KENNETH P. CHOINA, SR.,

Petitioner,

v.

E.I. DU PONT DE NEMOURS & CO.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this case, a jury returned a $11.3 million verdict in favor of petitioner. After final judgment had been entered, however, the court set aside the judgment pursuant to Federal Rule of Civil Procedure 60(b)(6) and ordered a new trial on the ground that one of petitioner's expert witnesses had perjured himself.

The questions presented are:

(1) Whether fraud by an expert witness is grounds for relief from a final judgment under Rule 60(b)(6) where the party sponsoring the witness and that party's counsel had no knowledge of or involvement in the fraud.

(2) Whether Rule 60(b)(6) affords relief from a final judgment on the ground of fraud by an expert witness where the evidence used to uncover the fraud was not newly discovered and the party seeking such relief failed to exercise due diligence.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
RULE INVOLVED	2
STATEMENT	3
REASONS FOR GRANTING THE PETITION	9
I. THE FIFTH CIRCUIT'S HOLDING THAT FRAUD BY A NONPARTY WITNESS, WITHOUT MORE, IS GROUNDS FOR RELIEF UNDER RULE 60(B)(6) CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AND WELL-ESTABLISHED PRINCIPLES OF STATUTORY CONSTRUCTION	11
II. THE DECISION BELOW CONFLICTS WITH THE HOLDINGS OF THIS COURT AND OTHER COURTS OF APPEALS THAT RULE 60(B)(6) RELIEF MAY ONLY BE GRANTED WHERE THE PARTY SEEKING SUCH RELIEF EXERCISED DUE DILIGENCE	19
CONCLUSION	25

TABLE OF CONTENTS—Continued

Page

APPENDICES

Appendix A: Opinion of the United States Court of Appeals for the Fifth Circuit, filed July 7, 1997 ..... 1a

Appendix B: Order of the United States Court of Appeals for the Fifth Circuit denying rehearing, filed August 4, 1997 ..... 11a

Appendix C: Transcript of hearing on Motion to Amend Judgment before the Hon. Edith Brown Clement, United States Judge, July 28, 1995 (Excerpt) 12a

TABLE OF AUTHORITIES

	Page
CASES:	
Ackerman v. *United States*, 340 U.S. 193 (1950)	9
Agostini v. *Felton*, 117 S. Ct. 1997 (1997)	9
Armour & Co. v. *Nard*, 56 F.R.D. 610 (N.D. Iowa 1972)	12
Boomhower, Inc. v. *American Auto. Ins. Co.*, 251 F.2d 385 (D.C. Cir. 1958)	12, 22
Bronson v. *Schulten*, 104 U.S. 410 (1882)	17
Browder v. *Director, Dep't of Corrections of Ill.*, 434 U.S. 257 (1978)	17
Coastal Transfer Co. v. *Toyota Motor Sales, U.S.A.*, 833 F.2d 208 (9th Cir. 1987)	21
Cotto v. *United States*, 993 F.2d 274 (1st Cir. 1993)	15
Crawford Fitting Co. v. *J.T. Gibbons, Inc.*, 482 U.S. 437 (1987)	14
Epling v. *United States*, 172 F.R.D. 220 (W.D. Ky. 1997)	15
Fourco Glass Co. v. *Transmirra Prods. Corp.*, 353 U.S. 222 (1957)	14
Geo. P. Reintjes Co. v. *Riley Stoker Co.*, 71 F.3d 44 (1st Cir. 1995)	18, 21
Gleason v. *Jandrucko*, 860 F.2d 556 (2d Cir. 1988)	18
Great Coastal Express, Inc. v. *International Bhd. of Teamsters*, 675 F.2d 1349 (4th Cir. 1982), *cert. denied*, 459 U.S. 1128 (1983)	18
Green v. *Bock Laundry Mach. Co.*, 490 U.S. 504 (1989)	15
Hazel-Atlas Glass Co. v. *Hartford-Empire Co.*, 322 U.S. 238 (1944), *overruled by Standard Oil Co. of Cal.* v. *United States*, 429 U.S. 17 (1976)	17
Helm v. *RTC*, 84 F.3d 874 (7th Cir. 1996)	15
HCSC-Laundry v. *United States*, 450 U.S. 1 (1981)	15
Hopper v. *Euclid Manor Nursing Home, Inc.*, 867 F.2d 291 (6th Cir. 1989)	13
Klapprott v. *United States*, 335 U.S. 601 (1949)	9, 23
Lester v. *Empire Fire & Marine Ins. Co.*, 87 F.R.D. 466 (E.D. Mo. 1980), *aff'd*, 653 F.2d 353 (8th Cir. 1981)	12

TABLE OF AUTHORITIES—Continued

	Page
Liljeberg v. *Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988)	9, 19
Mac Sales, Inc. v. *E.I. du Pont de Nemours & Co.*, 24 F.3d 747 (5th Cir. 1994)	3
Mallory v. *Eyrich*, 922 F.2d 1273 (6th Cir. 1991)	13
Metlyn Realty Corp. v. *Esmark, Inc.*, 763 F.2d 826 (7th Cir. 1985)	12
Morales v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992)	10, 14
Ocean Ins. Co. v. *Fields*, 18 F. Cas. 532 (C.C.D. Mass. 1841) (No. 10,406)	9
Olle v. *Henry & Wright Corp.*, 910 F.2d 357 (6th Cir. 1990)	13
Oxendine v. *Merrell Dow Pharm., Inc.*, 563 A.2d 330 (D.C. 1989), *cert. denied*, 493 U.S. 1074 (1990)	22, 23
Pioneer Invest. Servs. Co. v. *Brunswick Assocs. Ltd Partnership*, 507 U.S. 380 (1993)	9, 20
Plaut v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995)	9
Reinsurance Co. of Am., Inc. v. *Administratia Asigurarilor de Stat*, 902 F.2d 1275 (7th Cir. 1990)	20
Richardson v. *National R.R. Passenger Corp.*, 150 F.R.D. 1 (D.D.C. 1993), *aff'd*, 49 F.3d 760 (D.C. Cir. 1995)	12
Richardson v. *National R.R. Passenger Corp.*, 49 F.3d 760 (D.C. Cir. 1995)	12, 13
Simons v. *United States*, 452 F.2d 1110 (2d Cir. 1971)	11
Toledo Scale Co. v. *Computing Scale Co.*, 261 U.S. 399 (1923)	9, 20
Townsend v. *Sain*, 372 U.S. 293 (1963), *overruled by Keeney* v. *Tamayo-Reyes*, 504 U.S. 1 (1992)	21
Twelve John Does v. *District of Columbia*, 117 F.3d 571 (D.C. Cir. 1997)	15
United States v. *119.67 Acres of Land*, 663 F.2d 1328 (5th Cir. 1981)	16
United States v. *Mayer*, 235 U.S. 55 (1914)	17
United States v. *Smith*, 331 U.S. 469 (1947)	17
United States v. *Throckmorton*, 98 U.S. 61 (1878)	17, 18
Weese v. *Schukman*, 98 F.3d 542 (10th Cir. 1996)	18
Williams v. *Hatcher*, 890 F.2d 993 (7th Cir. 1989)	20

TABLE OF AUTHORITIES—Continued

	Page
Zimmer St. Louis v. *Zimmer Co.*, 32 F.3d 357 (8th Cir. 1994)	16
STATUTE:	
28 U.S.C. § 1254(1)	1
RULES:	
Fed. R. App. P. 4(a)	16
Fed. R. Civ. P. 60(b)	*passim*
Fed. R. Civ. P. 60(b) (1937)	13
Fed. R. Civ. P. 60(b)(1)	15
Fed. R. Civ. P. 60(b)(2)	22
Fed. R. Civ. P. 60(b)(3)	*passim*
Fed. R. Civ. P. 60(b)(6)	*passim*
Fed. R. Civ. P. 77(d)	16
OTHER AUTHORITY:	
Alvin C. Burns & Ronald F. Bush, *Marketing Research* (1995)	7
Gilbert A. Churchill, Jr., *Marketing Research Methodological Foundations* (5th ed. 1991)	7
12 James W. Moore, *Moore's Federal Practice* § 60.48[3] (1997)	15, 20
Restatement (Second) of Judgments § 74 (1980)	20
11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* (2d ed. 1995)	
§ 2851	24
§ 2860	13
§ 2864	8

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Kenneth P. Choina, Sr., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Fifth Circuit is unreported, but the court's judgment is noted at 121 F.3d 703. The Fifth Circuit's opinion is reprinted in the appendix hereto ("App.") at 1a. A prior opinion of the court in this case is reported at 24 F.3d 747.

JURISDICTION

The judgment of the Fifth Circuit was entered on July 7, 1997. App. 1a. The Fifth Circuit denied a timely petition for rehearing on August 4, 1997. App. 11a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULE INVOLVED

Federal Rule of Civil Procedure 60(b) provides:

Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

STATEMENT

Respondent E.I. du Pont de Nemours & Co. ("DuPont") manufactures certain fire resistant fabrics used in protective clothing. When DuPont was unable to develop a market for its Nomex spunlaced fabric, a relatively light and inexpensive flame resistant material, DuPont and Petitioner Kenneth P. Choina, Sr. ("Choina") entered into an agreement under which Choina would have the exclusive right to market spunlaced protective wear. Choina's efforts to market this garb were frustrated, however, by DuPont's insistence that he use a garment fabricator, or "cutter," approved by DuPont. DuPont's cutter restriction prevented Choina from employing less expensive fabric cutters, thus raising significantly the cost of manufacturing the spunlaced garments and preventing the enterprise from becoming economically viable. App. 2a; *Mac Sales, Inc.* v. *E.I. du Pont de Nemours & Co.*, 24 F.3d 747, 749-750 (5th Cir. 1994).

Choina therefore brought a diversity suit against DuPont in the United States District Court for the Eastern District of Louisiana alleging, among other things, that DuPont's cutter restriction constituted a breach of contract. Three trials and two appeals to the Fifth Circuit ensued.

At the first trial, the district court granted judgment as a matter of law for DuPont. The court of appeals reversed, however, holding as a matter of law that DuPont had breached the contract by imposing the cutter restriction. Accordingly, the court remanded "so that a jury may have the opportunity to determine whether Choina suffered any damage from the unjustified imposition of such a restriction by du Pont, and, if so, in what amount." *Mac Sales* v. *DuPont*, 24 F.3d at 754.

The central issue at the second trial was the extent of Choina's damages. In order to value the business he would have had but for DuPont's breach of contract,

Choina offered the testimony of two expert witnesses, Randolph J. Trappey, an expert in the field of marketing, and J. Stuart Wood, a consulting economist. It is Trappey's testimony that gives rise to the legal issues in this case.

Trappey, an Adjunct Professor at the Tulane School of Business,[1] testified that, based on a marketing survey he had designed, nearly the entire market for spunlaced garments existed at a price less than the $40 that DuPont's cutter restriction forced Choina to pay to DuPont's approved cutters. App. 2a; June 22, 1995 Tr. at 33-36, 56 (testimony of Trappey). In other words, Trappey's testimony was that the effect of the cutter restriction was to raise the cost of producing the spunlaced garments above the price that most consumers of the product would be willing to pay.

Trappey's survey consisted of telephone interviews of businesses likely to purchase protective clothing selected at random from the *Dunn & Bradstreet Million Dollar Directory*. June 22, 1995 Tr. at 21-23. The telephone calls and interviews were performed for Trappey by an MBA student, Rahul Rosha. *Id.* at 30-31.[2] Using a computer, Trappey then analyzed the data collected by Rosha. Trappey had explained his methodology—including the identity of and role played by Rosha—to

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[1] Not only was Trappey a professor of marketing, but he had experience as a marketing vice-president for a large family business and as a marketing research consultant to many other businesses. Trappey Dep. of Mar. 9, 1995 at 9-16. The trial court qualified Professor Trappey as an expert in the field of marketing research. June 22, 1995 Tr. at 15. Counsel for DuPont "accept[ed] [Trappey] as an expert." *Id.* at 14.

[2] Trappey explained that he did not perform the interviews himself because, as the person who would be analyzing the data, he wanted to avoid any possibility that bias might creep into the data collection process. June 22, 1995 Tr. at 30-31. He testified that "you typically have other people collect the data, somebody separate from the person that's actually going to do the analysis." *Id.* at 31.

counsel for DuPont in a deposition taken over three months prior to the trial. Trappey Dep. of Mar. 9, 1995 at 50-54. At the deposition, Trappey also produced to DuPont's counsel 36 pages of data collected during the survey. *Id.* at 39, 77.

At trial, Trappey testified that over 500 people were interviewed for the survey. *See* June 22, 1995 Tr. at 25 ("I think the final number came out to in excess of 580 people actually interviewed throughout the United States"); *id.* at 22 ("I might also add that we interviewed in excess of 500" people); *id.* at 40 ("How many people were surveyed? Five hundred and eighty-four").

On cross examination, however, DuPont challenged Trappey's testimony and attempted to convince the jury that far fewer people had been surveyed. *See* June 23, 1995 Tr. at 14 ("Mr. Trappey, there's absolutely no proof, is there, that your survey consisted of anywhere near 500 phone calls?"). In support of this line of attack, DuPont showed that, of the 36 pages of data that Trappey had produced at his deposition, and which Trappey had testified represented data from 500 interviews, all but nine of the pages were duplicates. *Id.* at 20-25.[3] DuPont used the duplicate pages in an attempt to show that Trappey did not call 500 persons—that, in fact, Trappey had falsified his data. *See id.* at 24 ("Mr. Trappey, isn't it clear that we can't count these pages and say this is 500 phone calls, as your testimony was before? You have falsified this marketing research data").[4] Through its cross-examination of Trappey, DuPont attempted to convince the jury that there were only "145 telephone calls on those nine pages." *Id.* at

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[3] DuPont's counsel later stated that they learned of the duplicate pages only the night before the trial, when one of their consultants noticed the duplication. July 28, 1995 Tr. at 8.

[4] Trappey testified that the production of duplicates pages was inadvertent and probably the result of a copying or printing error. June 23, 1995 Tr. at 21, 23, 24.

43. DuPont distributed copies of the duplicate pages to the jury. *Id.* at 15.

Apparently satisfied that DuPont's counsel had destroyed Trappey's credibility, DuPont elected not to call its own marketing expert or to seek a delay in the trial. During closing arguments, DuPont again argued to the jury that Trappey's "survey is a fraud." June 27, 1995 Tr. at 173; *see id.* at 174-175 ("Well, he made up the results and then he tried to document them with this worthless junk. * * * I think the report is a fraud"). DuPont argued that, far from surveying 500 people, Trappey had surveyed only 150. *Id.* at 175. Following deliberations, however, the jury returned a verdict finding that Choina had suffered damages in the amount of $11.3 million as a result of DuPont's breach of contract. *Id.* at 203. Three days later, the court entered judgment for Choina.

DuPont subsequently filed a motion seeking relief from the judgment under Rules 50, 59, and 60, in which it reiterated its claim that Trappey had committed fraud. In support of its motion, DuPont for the first time took the deposition of Rosha, the graduate student who assisted Trappey with the survey.

When DuPont questioned Rosha about the number of interviews he had conducted, Rosha testified that, although he may have placed 500 or 600 phone calls, the number of actual interviews he performed was "around a hundred." Rosha Dep. of July 12, 1995 at 11, 34. The other calls, Rosha explained, represented instances in which he was unable to reach the person he was calling or reached a person unwilling to be surveyed. Rosha testified that, when he told Trappey that he remembered conducting about 100 interviews, Trappey said "Well, I told the Court 600. * * * What I really meant was that I know you did a hundred, but when I said 600, what I meant was 600 people w[ere] contacted." *Id.* at 18-19; *see* App. at 5a n.3.

Trappey subsequently submitted to the court an affidavit in which he stood by his testimony that around 500 interviews had been conducted. Trappey Aff. of July 20, 1995. Trappey conceded, however, that of those "interviews," only 93 of them were "completed interviews." *Id.* ¶ 12. Trappey further stated that "interview" is a term of art in marketing with a meaning distinct from "completed interview." *Id.* ¶ 7. Trappey pointed to marketing texts supporting the distinction. *See, e.g.*, Gilbert A. Churchill, Jr., *Marketing Research Methodological Foundations* 618, 812-813 (5th ed. 1991). The Fifth Circuit later concluded that Trappey's distinction "likely" was "correct." App. 7a. *See generally* Alvin C. Burns & Ronald F. Bush, *Marketing Research* (1995).

The district court then held a hearing following which it granted DuPont's motion to set aside the judgment pursuant to Rule 60(b)(6). The court ruled that Trappey had "falsified his data," "misrepresented his methodology to the jury," "perjured himself," and given "fraudulent testimony." App. 13a.[5] The court specifically found, however, that "this fraud was not committed with the complicity of [Choina] or his counsel." *Id.*

Following its grant of DuPont's Rule 60(b) motion, the district court set the case for trial a third time. The court prohibited any further discovery, but ruled that Choina could call Trappey to testify. *Id.* at 13a-14a. After Trappey refused to testify on grounds of self-incrimination, Trappey Dep. of Sept. 29, 1995 at 14-20,

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[5] The court agreed, however, that Trappey's "methodology may have been correct." App. 13a. Likewise, counsel for DuPont conceded during the hearing that Trappey's study methodology was valid. *See* July 28, 1995 Tr. at 53 ("Your Honor, we're not questioning, at this point, the validity of his methodology"); *id.* at 70 ("Your Honor, we'll concede that we're not attacking the methodology. We'll concede that the methodology was correct"). The district court also acknowledged that Trappey's opinions may well have been correct. *See id.* at 65 ("Perhaps his numbers are right. Perhaps the survey is right. His percentage is probably correct").

both Choina and DuPont called new experts. This time, the jury awarded damages to Choina only in the amount of $176,000. App. 2a.

Choina appealed the district court's decision setting aside the final judgment entered after the second trial pursuant to Rule 60(b)(6). The Fifth Circuit affirmed.

Observing that "Rule 60(b)(3) allows relief from judgments when there is fraud by a party," App. 7a n.4, the Fifth Circuit concluded that "Rule 60(b)(6) motions are appropriate to remedy fraud by a third-party witness." *Id.* at 7a (citing 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 2864, at 352-353 (2d ed. 1995)). The court went on to hold that there was sufficient evidence from which the district court could conclude that Trappey committed perjury. App. 6a-7a.[6]

Rejecting Choina's argument that DuPont should have sought a continuance after learning of Trappey's perjury, the Fifth Circuit opined that "we are convinced that DuPont took appropriate steps after learning of Trappey's perjury. * * * Given the circumstances of this case, we cannot say that DuPont waived its right to Rule 60(b)(6) relief by not seeking a continuance and instead cross-examining Trappey about his perjury." *Id.* at 8a.[7]

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[6] The court conceded, however, that "[i]t is likely that Trappey is correct in distinguishing between interviews and completed interviews." App. 7a.

[7] Choina had also argued that DuPont did not exercise due diligence in discovering Trappey's fraud. Choina C.A. Br. 29-35. Choina pointed out that "Rosha was identified by Trappey during his March 9, 1995, discovery deposition; therefore, Rosha's deposition testimony did not constitute 'newly discovered' evidence after the entry of judgment. Du Pont also candidly admitted that it had known about the data printout error before trial. Du Pont failed to exercise due diligence by failing to depose Rosha before trial and by waiting until shortly before trial to consult with Dr. Cook," who spotted the duplicate pages. *Id.* at 30. The Fifth Circuit, however, did not address this argument in its opinion.

REASONS FOR GRANTING THE PETITION

Rule 60(b) "provides a procedure whereby, in appropriate cases, a party may be relieved of a final judgment." *Liljeberg* v. *Health Servs. Acquisition Corp.*, 486 U.S. 847, 863 (1988). Thus, the first five subparts of the rule authorize a trial court to grant relief for certain specified reasons, and Rule 60(b)(6) allows a court to do so for "any other reason justifying relief." This Court has admonished time and again that Rule 60(b)(6) affords relief from a final judgment only in "extraordinary circumstances." *Liljeberg*, 486 U.S. at 863 n.11, 864; *id.* at 873 (Rehnquist, C.J., dissenting); *id.* at 874 (O'Connor, J., dissenting).[8] "This very strict interpretation of Rule 60(b) is essential if the finality of judgments is to be preserved." *Id.* at 873 (Rehnquist, C.J., dissenting).[9]

The first issue in this case is whether Rule 60(b)(6) affords relief in the case of fraud by an expert witness where neither the party who sponsored the witness nor his counsel had any knowledge of or involvement in the fraud.[10] The Fifth Circuit's holding in this case that

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[8] *Accord Klapprott* v. *United* States, 335 U.S. 601, 613 (1949); *Ackermann* v. *United States*, 340 U.S. 193, 199 (1950); *Pioneer Invest. Servs. Co.* v. *Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 393 (1993); *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 233 (1995); *Agostini* v. *Felton*, 117 S. Ct. 1997, 2018 (1997).

[9] This Court has long recognized the strong policy favoring the finality of judgments. *See Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 425 (1923) (" 'It is for the public interest and policy to make an end to litigation, or, as was pointedly said by a great jurist, that suits may not be immortal, while men are mortal' ") (quoting *Ocean Ins. Co.* v. *Fields*, 18 F. Cas. 532, 539 (C.C.D. Mass. 1841) (No. 10,406) (Story, J.)).

[10] Choina disputed strongly in the courts below the district court's finding that Trappey perjured himself. He contended that at most there was an inadvertent misunderstanding about the use of language and never an intent to deceive. The district court specifically found that "this fraud was not committed with the complicity of Plaintiff or his counsel." App. 13a. For purposes of this

Rule 60(b)(6) does afford relief in such circumstances is in conflict with a decision of the Second Circuit, which reasoned that it would be "most perverse[ ]" to construe the rule in that way because Rule 60(b)(3) specifically addresses fraud as a ground for relief from a judgment and limits such relief to fraud "of an adverse party." The Second Circuit rule, unlike the Fifth Circuit rule, therefore conforms to the well-established canon "of statutory construction that the specific governs the general." *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992).

The second issue is whether fraud by an expert witness presents the "extraordinary circumstances" necessary for Rule 60(b)(6) relief where the party seeking such relief failed to act with due diligence in discovering the fraud, and the evidence used to uncover the fraud was not "newly discovered." In this case, Trappey's perjury was exposed on the basis of the duplication in the 36 pages of data and the testimony of Rosha. The documents, however, had been produced to DuPont at Trappey's deposition over three months prior to the trial. And DuPont learned about Rosha at the same deposition but simply chose not to obtain his testimony. In such circumstances, it was error for the courts below to grant relief under Rule 60(b)(6), as decisions by this Court and other courts of appeals make clear.

In sum, review of the decision below is plainly warranted in light of these conflicts and because the need for clarification of the proper scope of Rule 60(b)(6) is patent.

Petition, however, Choina does not dispute the finding of fraud on the part of Trappey.

I. THE FIFTH CIRCUIT'S HOLDING THAT FRAUD BY A NONPARTY WITNESS, WITHOUT MORE, IS GROUNDS FOR RELIEF UNDER RULE 60(B)(6) CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AND WELL-ESTABLISHED PRINCIPLES OF STATUTORY CONSTRUCTION.

a. The Fifth Circuit's holding that fraud by a nonparty witness is grounds for relief under Rule 60(b)(6), even where the party sponsoring the witness and that party's counsel had no knowledge of or involvement in the fraud, directly conflicts with *Simons* v. *United States*, 452 F.2d 1110 (2d Cir. 1971). There, a widow sought to vacate a judgment of naturalization secured years earlier by her late husband. The judgment had been obtained on the basis of "knowingly false" representations made by the two of them concerning their intentions to become permanent residents. *Id.* at 1112. For a unanimous court, Judge Friendly wrote that the question is whether "the district court had power to entertain her motions to vacate the naturalization decrees" and that "[t]he answer is clearly negative." *Id.* at 1115.

The Second Circuit first held that the district court had no power under Rule 60(b)(3), since Mrs. Simons' "allegations were of fraud, but she did not allege fraud 'of an adverse party,' as required by (3)." *Id.* Having ruled out Rule 60(b)(3), the court then explained that Mrs. Simons "fares no better under the residual clause (6). Since clause (3) permits relief only for fraud of an adverse party * * *, it would be reading clause (6) most perversely to say that it authorizes attack for one's own or a non-adverse party's fraud * * *." *Id.*[11]

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[11] The Second Circuit ruled in the alternative that Mrs. Simons' Rule 60(b) motion was untimely. *See* 452 F.2d at 1115 ("in any event, her motions were not made within the required one year after the decrees were entered").

In this case, the Fifth Circuit held that a judgment can be attacked under Rule 60(b)(6) on grounds of fraud by someone who was not an adverse party but merely a witness, thereby accepting a reading of Rule 60(b)(6) that the *Simons* court rejected as "most perverse[ ]" and permitting the district court to exercise a power that the Second Circuit held was "clearly" lacking under that rule. *See also Richardson* v. *National R.R. Passenger Corp.*, 49 F.3d 760, 765 (D.C. Cir. 1995) (questioning whether "misconduct by a witness other than an 'adverse party' could constitute grounds for relief under" Rule 60(b)(6)); *Boomhower, Inc.* v. *American Auto. Ins. Co.*, 251 F.2d 385, 385 (D.C. Cir. 1958) (perjury by a witness did "not reach the gravity contemplated by the 'any other reason justifying relief' provision of Rule 60(b)(6), even assuming that provision to be applicable here").[12]

It is true that in *Simons* the fraud was committed, not by a witness, as was the case here, but by the same party seeking relief under Rule 60(b) and by a coparty, her husband. But there is no basis in the text of Rule 60(b)(6) for drawing a distinction between fraud by a witness and fraud by a non-adverse party. If, as *Simons* held, Rule 60(b)(3)'s application to cases of fraud by "an adverse party" means it is perverse to read Rule 60(b)(6) as applying to a party's own fraud, it is just as perverse to read the rule as applying to fraud by a nonparty

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[12] Although some other courts have stated that fraud by a witness or a nonparty is potential grounds for relief under Rule 60(b)(6), each such statement was dicta because in every case the court granted no relief. *See Metlyn Realty Corp.* v. *Esmark, Inc.*, 763 F.2d 826, 832 (7th Cir. 1985); *Richardson* v. *National R.R. Passenger Corp.*, 150 F.R.D. 1, 7 (D.D.C. 1993), *aff'd*, 49 F.3d 760 (D.C. Cir. 1995); *Lester* v. *Empire Fire & Marine Ins. Co.*, 87 F.R.D. 466, 467 (E.D. Mo. 1980), *aff'd*, 653 F.2d 353, 354 (8th Cir. 1981); *Armour & Co.* v. *Nard*, 56 F.R.D. 610, 612 (N.D. Iowa 1972).

witness. Thus, both the holding and logic of *Simons* are in square conflict with the decision below.[13]

b. The Second Circuit's interpretation of Rules 60(b)(3) and 60(b)(6) in *Simons* reflects a proper application of the well-established principle of statutory construction that the specific governs the general. By contrast, the Fifth Circuit's decision in this case ignores and conflicts with that principle.

The first five subparts of Rule 60(b) enumerate specific reasons for which a court may vacate a final judgment. Rule 60(b)(3) applies to "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party."[14] Thus, the express terms of Rule 60(b)(3) limit possible relief to fraud or the like by "an adverse party." *See, e.g., Richardson*, 49 F.3d at 765 ("Amtrack was certainly not entitled to relief under Rule 60(b)(3) as to that judgment once it was determined that Richardson bore no responsibility for the testimony of Dr. Goltz [Richardson's

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[13] The Fifth Circuit's decision also conflicts with a line of cases in the Sixth Circuit holding that, to be entitled to relief under Rule 60(b)(6), "something more" than that which would be necessary for relief under Rules 60(b)(1)-(5) must be shown. *Mallory* v. *Eyrich*, 922 F.2d 1273, 1280 (6th Cir. 1991); *Olle* v. *Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1990); *Hopper* v. *Euclid Manor Nursing Home, Inc.*, 867 F.2d 291, 294 (6th Cir. 1989). Clearly, fraud by a third party witness is something *less* than would be necessary for relief under Rule 60(b)(3).

[14] When Rule 60(b) was first enacted, it contained no provision for relief based on fraud. Rather, the operative portion of the pre-1948 version of Rule 60(b) stated: "On motion the court, upon such terms as are just, may relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect." Rule 60(b) (1937). It was not until the Rule was amended in 1946 (which amendment took effect in 1948) that the current version of Rule 60(b)(3) came into being. Thus, "[p]rior to 1948 there was considerable doubt whether fraud was a ground for a motion under Rule 60(b)." 11 Wright & Miller, *Federal Practice and Procedure* § 2860, at 310.

expert witness]. * * * Rule 60(b)(3) requires a showing that the alleged 'misconduct' is attributable to 'an adverse party' ").[15] Because the district court found—and DuPont does not contend otherwise—that Trappey alone was responsible for the fraud at issue here, Rule 60(b)(3) provides no basis for setting aside the final judgment and the $11.3 million verdict in favor of Choina.[16]

Because Rule 60(b)(3) specifically addresses fraud as a ground for providing relief from a judgment—and limits relief to fraud by "an adverse party"—the general catch-all language of Rule 60(b)(6) should not be interpreted to provide broader relief. Such an interpretation would run roughshod over the longstanding principle that a specific statutory provision governs a general one. *See Morales* v. *Trans World Airlines*, *supra*; *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987). "[T]he law is settled that however inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment." *Fourco Glass Co.* v. *Transmirra Prods. Corp.*, 353 U.S. 222, 228 (1957) (quotation marks, citations, and brackets omitted). This "basic principle of statutory construction" applies "particularly when the two [provisions] are interrelated and closely positioned, both in fact being parts of" the same statu-

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[15] *Richardson* rejected the argument that it should "treat expert testimony as equivalent to that of 'an adverse party'" for purposes of Rule 60(b)(3) because that approach, said the court, "would, of course, substitute a less restrictive limitation for the one expressly adopted under the Rules." 49 F.3d at 765.

[16] The district court in this case at one point appeared to recognize as much. *See* July 28, 1995 Tr. at 75 ("I haven't seen the Defendant present any cases to the Court to show that I can apply 60(b)(3) if the party or the lawyers are not involved. And I don't believe Mr. Choina or the Milling firm was involved"). Yet the court thereafter expressly relied upon Rule 60(b)(6) in vacating the judgment. *See id.* at 109 ("pursuant to Rule 60(b)(6), the Court grants Defendant's motion").

tory scheme. *HCSC-Laundry* v. *United States*, 450 U.S. 1, 6 (1981). There can be no question but that this principle applies to the construction of federal rules of procedure. *See Green* v. *Bock Laundry Mach. Co.*, 490 U.S. 504, 524 (1989) (applying the principle in construing the Federal Rules of Evidence). Rule 60(b)(3) thus occupies the field with respect to fraud and preempts any application of Rule 60(b)(6) to fraud by a nonparty. *Cf. Cotto* v. *United States*, 993 F.2d 274, 278 (1st Cir. 1993) ("clause (6) may not be used as a vehicle for circumventing clauses (1) through (5)").

The Fifth Circuit's error in failing to apply the interpretive canon described above is clearly visible when one considers other provisions of Rule 60(b). For instance, Rule 60(b)(1) allows a court to grant relief for, *inter alia*, "excusable neglect." Under the Fifth Circuit's approach—that is, an approach under which the specific terms of Rule 60(b)(1) do not control the general terms of Rule 60(b)(6)—Rule 60(b)(1)'s application to cases of "excusable neglect" would not bar Rule 60(b)(6) from applying to cases of *in*excusable neglect. That, however, is not the law. *See Helm* v. *RTC*, 84 F.3d 874, 878 (7th Cir. 1996) (holding that "Rule 60(b)(6) does not provide relief for inexcusable neglect that fails to qualify for relief under Rule 60(b)(1)"); *Epling* v. *United States*, 172 F.R.D. 220, 223 (W.D. Ky. 1997) (same). As one commentator has explained,

> only *excusable* neglect is grounds for relief under Rule 60(b)(1). It follows that deliberate and willful conduct that is *inexcusable* under Rule 60(b)(1) should not form the basis for relief under Rule 60(b)(6) any more than it does under Rule 60(b)(1). [12 James W. Moore, *Moore's Federal Practice* § 60.48[3], at 60-168 (1997) (emphasis in original).[17]]

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[17] The Fifth Circuit's errant approach has been adopted by the D.C. Circuit in the context of Rule 60(b)(1). *See Twelve John Does* v. *District of Columbia*, 117 F.3d 571, 578 (D.C. Cir. 1997)

Similarly, Rule 77(d), which directs the clerk to serve notice upon each party of the entry of judgment, provides that "[l]ack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed" under Federal Rule of Appellate Procedure 4(a). It has been held that, because of Rule 77(d)'s specific language, lack of notice is not grounds for relief under the general language of Rule 60(b)(6). *See Zimmer St. Louis* v. *Zimmer Co.*, 32 F.3d 357, 361 (8th Cir. 1994) ("the plain language of both Fed.R.App.P. 4(a)(6) and Fed.R.Civ.P. 77(d) addresses specifically the problem of lack of notice of a final judgment. That specificity, in our view, precludes the use of Fed.R.Civ.P. 60(b)(6) to cure problems of lack of notice"). Under the Fifth Circuit's approach, however, relief for lack of notice would seem to be available under Rule 60(b)(6), contrary to *Zimmer*.

The holding of the Fifth Circuit in this case also introduces another anomaly into Rule 60(b). That Rule provides that a motion under Rule 60(b)(3) must be made "not more than one year after the judgment, order, or proceeding was entered or taken," but that a Rule 60(b)(6) motion need only be made "within a reasonable time." *See, e.g., United States* v. *119.67 Acres of Land*, 663 F.2d 1328, 1331 (5th Cir. 1981) (Rule 60(b)(6) motion filed four years after entry of judgment was made within a reasonable time). Under the Fifth Circuit's approach in this case, a court could void a judgment because of fraud by a witness under Rule 60(b)(6) more than a year after the judgment was entered even though the court would clearly be barred from granting such relief at that point on grounds of fraud by an adverse party.

("we have construed Rule 60(b)(6)'s catchall provision, allowing correction for 'any other reason justifying relief,' as calling for relief in extreme cases even where the moving party has been guilty of *in*excusable neglect") (emphasis in original).

c. Finally, the conclusion that Rule 60(b)(6) does not reach fraud by a third party witness is consistent with the so-called "saving provision" of Rule 60(b), which provides: "This rule does not limit the power of a court * * * to set aside a judgment for fraud on the court." It is clear, however, that perjury by a witness, without more, does not constitute fraud on the court.

In *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238 (1944), *overruled on other grounds by Standard Oil Co. of Cal.* v. *United States*, 429 U.S. 17 (1976), this Court found fraud on the court where Hartford's counsel was involved in a "deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals," 322 U.S. at 245-246, but drew the line on the case of fraud by a witness, saying that "[t]his is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury." *Id.* at 245. *See also United States* v. *Throckmorton*, 98 U.S. 61, 66 (1878) ("the doctrine is equally well settled that the court will not set aside a judgment [after the term in which it was entered] because it was founded on a fraudulent instrument, or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed").[18]

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[18] At common law, prior to the adoption of the Federal Rules of Civil Procedure, the general rule was that a court could set aside a final judgment for any reason during the judicial term in which the judgment was entered. *See, e.g., Bronson* v. *Schulten*, 104 U.S. 410, 415 (1882); *United States* v. *Mayer*, 235 U.S. 55, 67 (1914). The 1946 amendments to the Federal Rules, however, abolished terms of court and limited the power of courts to affect final judgments to the time periods stated in Rules such as Rule 60(b). *See Browder* v. *Director, Dep't of Corrections of Ill.*, 434 U.S. 257, 271 (1978). " 'The Rules, in abolishing the term rule, did not substitute indefiniteness. On the contrary, precise times, independent of the term, were prescribed.' " *Id.* (quoting *United States* v. *Smith*, 331 U.S. 469, 473 n.2 (1947)).

In keeping with *Hazel-Atlas*, the courts of appeals have held that perjury by a witness—or even a party—without the involvement of any officer of the court does not constitute fraud on the court. *See, e.g., Weese* v. *Schukman*, 98 F.3d 542, 553 (10th Cir. 1996) (a party's "material misrepresentations or omi[ssion of] information needed to make his answers fully truthful * * * simply do not rise to the level necessary to constitute 'fraud on the court'"); *Geo. P. Reintjes Co.* v. *Riley Stoker Corp.*, 71 F.3d 44, 49 (1st Cir. 1995) ("In sum, perjury alone, absent allegation of involvement by an officer of the court * * *, has never been sufficient"); *Gleason* v. *Jandrucko*, 860 F.2d 556, 559 (2d Cir. 1988) ("After-discovered evidence of alleged perjury by a witness is simply not sufficient for a finding of 'fraud upon the court' "); *Great Coastal Express, Inc.* v. *International Bhd. of Teamsters*, 675 F.2d 1349, 1357 (4th Cir. 1982), *cert. denied*, 459 U.S. 1128 (1983).[19]

Sound reasons support these holdings. As the First Circuit has explained, "[t]he possibility of perjury, even concerted, is a common hazard of the adversary process with which litigants are equipped to deal through discovery and cross-examination, and, where warranted, motion for relief from judgment to the presiding court." *Geo. P. Reintjes*, 71 F.3d at 49 (citing Rule 60(b)(3)). *See also Great Coastal Express*, 675 F.2d at 1357 ("Perjury and fabricated evidence are evils that can and should be exposed at trial, and the legal system encourages and expects litigants to root them out as early as possible"). And as this Court said in *Throckmorton*, "the mischief of retrying every case in which the judgment or decree [was] rendered on false testimony, given by

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19 " '[F]raud on the court' is typically confined to the most egregious cases, such as bribery of a judge or juror, or improper influence exerted on the court by an attorney, in which the integrity of the court and its ability to function impartially is directly impinged." *Great Coastal Express*, 675 F.2d at 1356. The fraud in *Hazel*-Atlas, for example, not only involved officers of the court but reached everyone affected by the patent at issue.

perjured witnesses * * * would be greater, by reason of the endless nature of the strife, than any compensation arising from doing justice in individual cases." 98 U.S. at 68-69.

Since perjury by a nonparty witness, without more, is not "fraud on the court," it is not surprising that it falls outside of the ambit of Rules 60(b)(3) or 60(b)(6).

II. THE DECISION BELOW CONFLICTS WITH THE HOLDINGS OF THIS COURT AND OTHER COURTS OF APPEALS THAT RULE 60(B)(6) RELIEF MAY ONLY BE GRANTED WHERE THE PARTY SEEKING SUCH RELIEF EXERCISED DUE DILIGENCE.

Where, as here, a party bases a claim for relief from a final judgment on perjury by a witness, it is necessary for that party to show that the perjury could not have been discovered before judgment through the exercise of due diligence. DuPont has not, and cannot, make such a showing in this case.[20]

a. This Court's decision in *Liljeberg* involved a judgment entered by a trial judge who, unknown to the parties at the time, had a conflict of interest and should have disqualified himself from the case. This Court held that the judge's conflict was proper grounds for relief under Rule 60(b)(6). In so holding, however, the Court stressed that, "[o]f particular importance, this is not a case involving neglect or lack of due diligence by respondent." 486 U.S. at 863 n.11. Indeed, as commentators have noted, the Court "took considerable trouble to explain that the only neglect involved was that of the judge, and how the moving party could not possibly have discovered the conflict at an earlier stage of the

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[20] Indeed, DuPont has not even tried to. In the court below, DuPont took the position that it was "irrelevant" under Rule 60(b)(6) whether it exercised due diligence in uncovering Trappey's fraud. DuPont C.A. Br. 30-31.

proceeding." *Moore's Federal Practice* § 60.48[2] at 60-169. Thus, the Court explained that "even if respondent had taken the unusual step of reviewing the judge's financial disclosure forms * * * the conflict would not have been brought to its attention. * * * This [conflict] would not have been made apparent through examination of the disclosure reports and, according to respondent, was not a matter of public record at the time the case was tried and decided." 486 U.S. at 863-864 n.11.

In short, under *Liljeberg*, a party's lack of sufficient diligence in unearthing the basis for attacking the judgment in question precludes relief under Rule 60(b)(6). *Accord Pioneer Invest. Servs.*, 507 U.S. at 393 ("To justify relief under subsection (6), a party must show 'extraordinary circumstances' suggesting that the party is faultless in the delay"); Restatement (Second) of Judgments § 74 (1980) ("relief from a judgment will be denied if: (1) The person seeking relief failed to exercise reasonable diligence in discovering the ground for relief"); *see also Toledo Scale*, 261 U.S. at 425 (calling "most salutary" the rule that "refuses to permit [parties] to drag out litigation by bringing in new evidence which with due diligence they ought to have discovered before the hearing"). Consistent with *Liljeberg*, the Seventh Circuit rule is that "the party seeking relief under Rule 60(b)(6) [must] demonstrate diligence before the extraordinary relief c[an] be granted." *Williams* v. *Hatcher*, 890 F.2d 993, 996 (7th Cir. 1989). *Accord, e.g., Reinsurance Co. of Am., Inc.* v. *Administratia Asigurarilor de Stat*, 902 F.2d 1275, 1278 (7th Cir. 1990) ("because of its lack of diligence in following the course of this case, ADAS is precluded from demanding Rule 60(b) relief").

In this case, DuPont's discovery of Trappey's perjury was anything but diligent. DuPont was led to Trappey's perjury—*i.e.*, his false testimony that over 500 "interviews" were conducted—by two pieces of evidence: the duplicate pages of data and the testimony of

Rosha. DuPont had every opportunity to discover the actual number of interviews well in advance of trial. DuPont deposed Trappey on March 9, 1995, over three months before the trial commenced. DuPont, however, failed to ask Trappey any questions about the number of interviews comprising his survey. Furthermore, Trappey produced to DuPont the 36 pages of data at the deposition. Thus, although DuPont claimed that it discovered the duplicate pages the night before the trial started, DuPont had more than three months to spot the page duplication and question Trappey about it. Finally, Trappey disclosed at his deposition the identity and role of Rosha, yet DuPont made no attempt to depose Rosha or call him to testify.

Under such circumstances, to say that DuPont exercised "due diligence" is to ascribe to the English language a malleability it simply does not possess. This is not a case, like *Liljeberg*, where DuPont could not have found the evidence well in advance of trial through reasonable effort. As the First Circuit said in a similar context, if DuPont "should have won, then the most that can be said is that it lost in large measure due to its own lack of diligence." *Geo. P. Reintjes*, 71 F.3d at 49.

Furthermore, the underlying evidence that led to the discovery of Trappey's perjury cannot be characterized as "newly discovered." Although DuPont did not notice the duplication in the 36 pages until the eve of trial, and did not seek Rosha's testimony until after the trial was over, "[e]vidence is not 'newly discovered' under the Federal Rules if it was in the moving party's possession at the time of trial or could have been discovered with reasonable diligence." *Coastal Transfer Co.* v. *Toyota Motor Sales, U.S.A.*, 833 F.2d 208, 212 (9th Cir. 1987). *See also Townsend* v. *Sain*, 372 U.S. 293, 317 (1963) (in habeas corpus context, newly discovered evidence is "evidence which could not reasonably have been presented" in the first proceeding), *overruled on other grounds by Keeney* v. *Tamayo-Reyes*, 504 U.S. 1 (1992).

Cf. Rule 60(b)(2) (relief available for "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial"). Because DuPont had the duplicate pages over three months before trial, and because nothing prevented it from taking Rosha's deposition well in advance of the trial, neither the pages nor Rosha's deposition constitute "newly discovered evidence." *See Boomhower*, 251 F.2d at 385 ("The evidence [of witness perjury] can only doubtfully be described as newly discovered [under Rule 60(b)(6)]: plaintiff-appellant could have taken the witness' deposition or otherwise made timely discovery").

Finally, although at the time of trial DuPont did not have Rosha's testimony or knowledge of all of the details of Trappey's fraud, DuPont did expose Trappey's false testimony to the jury. As noted above, based on the duplicate pages, DuPont accused Trappey at trial of falsifying his data and misrepresenting the number of interviews involved in his survey. *See* June 23, 1995 Tr. at 14 ("Mr. Trappey, there's absolutely no proof, is there, that your survey consisted of anywhere near 500 phone calls?"); *id.* at 24 ("Mr. Trappey, isn't it clear that we can't count these pages and say this is 500 phone calls, as your testimony was before? You have falsified this marketing research data"). DuPont renewed this line of attack at closing argument. *See* June 27, 1995 Tr. at 173-175. Clearly, then, not only was the fraud in Trappey's testimony discoverable prior to trial in the exercise of due diligence, the general nature of the fraud (though not the extent of it) was, in fact, discovered prior to trial and even argued to the jury.

b. By affording relief from a final judgment in the absence of due diligence by the party seeking such relief, the Fifth Circuit's decision is contrary to *Oxendine* v. *Merrell Dow Pharmaceuticals, Inc.*, 563 A.2d 330 (D.C. 1989), *cert. denied*, 493 U.S. 1074 (1990). As in this case, the trial court there threw out a judgment in favor

of the plaintiff pursuant to Rule 60(b)(6)[21] on the ground that plaintiff's expert witness "knowingly and intentionally gave false testimony at trial." *Id.* at 332. The expert—Dr. Done—gave false testimony in six areas relating to his qualifications as an expert. Unlike this case, however, the D.C. Court of Appeals reversed the trial court's decision.

The Court of Appeals observed that "Rule 60(b)(6) is intended for unusual and extraordinary situations justifying an exception to the overriding policy of finality." *Id.* at 334 (citing *Klapprott*). "To award a new trial," said the court, "the evidence must in fact have been newly discovered since the trial, [and] its recent discovery cannot be due to lack of diligence by the movant." *Id.* Applying these standards, the Court of Appeals held that relief under Rule 60(b)(6) was unwarranted.

> Five of Dr. Done's statements found by Judge Wolf to be misrepresentations were matters either previously known or readily capable of being learned by appellee in the course of conducting pretrial discovery about Dr. Done's qualifications as an expert. As such, they cannot be considered to have been newly discovered, and the failure to discover them prior to trial shows a lack of diligence by appellee for which it has provided no explanation. [*Id.*]

Clearly, the outcome of this case would have been different had it been decided by the *Oxendine* court. As explained above, all of the information that DuPont used to demonstrate Trappey's fraud was "known or readily capable of being learned by" DuPont prior to trial. DuPont could have asked Trappey in his deposition about the number of interviews he conducted. It did not. DuPont could have deposed Rosha, whose identity it learned during Trappey's deposition. It did not. DuPont had possession of the 36 pages of data prior to the trial

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[21] The District of Columbia's Rule 60(b)(6) is identical to Federal Rule 60(b)(6). *See Oxendine*, 563 A.2d at 332 n.5.

and could have questioned Trappey about the duplications before trial. It did not. DuPont's dilatory behavior prevents the award of relief under Rule 60(b).

* * *

As noted in the preceding sections, the decision of the Fifth Circuit in this case is in conflict with this Court's decisions and the decisions of other courts of appeals. But this case is just one of "the large number of conflicting and confusing decisions decided under clause (6)," which decisions "reflect problems courts have had in interpreting the rule as a whole." 11 Wright & Miller, *Federal Practice and Procedure* § 2851, at 231 (quotation marks omitted). It is a matter of utmost importance that the so-called "catchall" provision of Rule 60(b)(6) not be converted into a method of attacking final judgments. This Court should use this case as a vehicle for bringing some much needed clarity to this important area of the law. It should particularly do so in the context of a case in which a plaintiff has been deprived of a substantial award rendered by a jury after due deliberation.[22]

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[22] As Choina's counsel pointed out below, there are serious Seventh Amendment implications in the trial court's Rule 60(b)(6) ruling. *See* Choina C.A. Br. 28; Pet. for Reh'g 9-10.

CONCLUSION

For the forgoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

Appendix A

[Filed July 7, 1997]

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-30420

MAC SALES INC., ET AL,

Plaintiffs,

KENNETH P. CHOINA, SR.,

Plaintiff-Appellant,

VERSUS

E. I. DUPONT DE NEMOURS, AND COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
(89-CV-4571-N)

Before REYNALDO G. GARZA, EMILIO M. GARZA, and DeMOSS, Circuit Judges.

DeMOSS, Circuit Judge:*

Plaintiff Kenneth Choina sued defendant E.I. duPont de Nemours & Co. ("DuPont") for breach of contract. The district court granted judgment as a matter of law in favor of DuPont after the first trial. We reversed that judgment and remanded the case in *Mac Sales, Inc.* v.

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* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

E.I. du Pont de Nemours & Co., 24 F.3d 747 (5th Cir. 1994). The jury in the second trial found for Choina, awarding damages of $11.3 million. The district court, however, determined that Choina's marketing expert perjured himself. The district court, pursuant to Federal Rule of Civil Procedure 60(b)(6), vacated the judgment and ordered a new trial. Choina obtained a favorable jury verdict in the third trial, but the jury awarded him only $176,000.

Choina appeals, arguing that the district court erred in (1) setting aside the second trial, (2) sanctioning him because of his marketing expert's conduct, and (3) lowering his damages for failure to mitigate. Finding no reversible error, we affirm the judgment of the district court.

BACKGROUND

Choina claims that DuPont breached its agreement giving him the exclusive right to market a flame resistant fabric manufactured by DuPont. Specifically, Choina contends that DuPont's improper requirement that he use only approved fabric cutters raised his costs so high that he could not sell the clothes for a profit.

The first jury trial took place in April 1993, with the district court granting judgment as a matter of law in favor of DuPont. Choina appealed and a panel of our Court reversed, sending the case back for trial. *See Mac Sales, Inc.* v. *E. I. du Pont de Nemours & Co.*, 24 F.3d 747 (5th Cir. 1994).

At the second trial, in June 1995, marketing expert Randolph Trappey testified for Choina. Trappey conducted a market survey which determined that almost the entire market for Choina's clothes existed at a cost of less than the $40 per outfit Choina had to charge if he used DuPont's approved cutters. Exactly how the survey was conducted and how Trappey described the survey to the jury is the main issue in this case.

Trappey testified at trial that he interviewed 500 companies for his survey. This was done by selecting 500 companies which bought fire resistant clothes. He and his research assistant then phoned the safety director at each company, described the clothes and asked how much the company would be willing to pay for such a product. Trappey failed to inform the jury that, of the 500 companies called, he was only able to complete interviews with 100. As Trappey explained after the trial, the act of calling a company, regardless of whether the company answered his questions, was referred to by Trappey as an "interview." Trappey referred to those complete questionnaires as "completed interviews."

During the second trial, Trappey emphasized to the jury that he interviewed 500 companies in coming to his conclusions about Choina's losses. For example, he said, "I might also add that we interviewed in excess of 500—we pulled more than 500 people from our 'barrel' when we talked to them." Trappey later said "I think the final number came out to in excess of 580 people actually interviewed throughout the United States."

In support of his claim that 500 people had been interviewed, Trappey produced data sheets showing 500 separate phone calls. During cross-examination, DuPont's counsel showed that of the 36 pages of data sheets, all but nine pages were duplicates. Thus, the data sheets showed only 100 completed interviews.

The jury in the second trial found for Choina and awarded damages of $11.3 million. Following the second jury trial, DuPont filed a motion under Federal Rule of Civil Procedure 60(b)(6)[1] to set aside the verdict on the ground that Trappey falsified his data and perjured himself at trial. The district court required Choina

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1 Federal Rules of Civil Procedure provides that "[o]n motion and upon such terms as are just, the court may relieve a party . . . from a final judgment . . . for (6) any other reason justifying relief from the operation of the judgment."

to turn over Trappey's data and allowed DuPont to depose Raoul Rosha, Trappey's research assistant. After a hearing, the district court granted DuPont's motion to set aside the verdict. The district court found clear and convincing evidence that Trappey falsified his data and perjured himself at trial.[2]

A third jury trial was held in March 1996. Trappey refused to testify in that trial unless he was granted immunity. Choina used a different marketing expert in this trial and DuPont also used a marketing expert. The

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[2] The district court stated that:

> Mr. Trappey's testimony today highlights the misrepresentation upon which the jury relied. The evidence that Mr. Trappey falsified his data and his report and that he perjured himself is clear and convincing.
>
> While his methodology may have been correct, he misrepresented his methodology to the jury. While this fraud was not committed with the complicity of Plaintiff or his Counsel, the court nevertheless concludes that Plaintiff has prevailed in this case because of Mr. Trappey's fraudulent testimony.
>
> That not only is the Defendant injured in this event, but the entire judicial system and the Court suffers as a result.
>
> The Court will not allow a verdict founded upon unmitigated fraud to stand.
>
> Mr. Trappey's testimony provided the entire basis for the jury's award. Without Mr. Trappey, there was no evidence of a market for Plaintiff's product. There is no basis for Dr. Wood's testimony.
>
> This case is extraordinary, in that the sole evidence supporting a multi-million dollar verdict is the clearly fraudulent testimony of an expert witness who supplied Defense counsel with fraudulent documents that prevented Defendant from fully presenting its case.
>
> Allowing this verdict to stand would cause substantial injustice. The Court will not sit idly by and allow Mr. Trappey to visit this injustice on the Defendant or the Court. Accordingly, pursuant to Rule 60(b) 6), the Court grants Defendant's motion and the judgment entered in accordance with the jury's answers be set aside.

jury again found for plaintiff, but awarded only $176,000.

Choina filed a timely notice of appeal.

DISCUSSION

Rule 60(b)(6) Motion

"We employ an abuse of discretion standard in our review of the district court's denial of Appellant's Rule 60(b)(6) motion." *Pease* v. *Pakhoed Corp.*, 980 F.2d 995, 998 (5th Cir. 1993). Choina argues that the district court abused its discretion in granting the Rule 60(b)(6) motion for two reasons: (1) Trappey did not perjure himself while testifying, and (2) because DuPont made the strategic choice of attacking Trappey's credibility and sending the case to the jury, rather than seeking a recess or continuance, it is not entitled to this extraordinary remedy.

Choina contends that Trappey did not lie. He may not have been as clear as he could have about the difference between interviews and completed interviews, but he did not commit perjury. He contends that marketing research textbooks support his interview/completed interview distinction. Choina argues that the only evidence that Trappey lied comes from Rosha, his assistant, who is only a graduate student.[3] This evidence, he maintains,

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[3] Rosha testified that Trappey asked him how many surveys he had done, to which he responded:

> I said, "Well, yes, I remember it was around a hundred."
>
> And he said, 'Well, I told the court 600.'
>
> So—I mean I—I didn't know what—I mean I was silent.
>
> And then he said, "No. What I really meant was that I know you did a hundred, but when I said 600, what I meant was 600 people was [*sic*] contacted. So did—did you—didn't you contact 600?"
>
> So I told him that "Well, I couldn't exactly say 600, but, yes a lot of people were contacted."

is insufficient to support a finding of perjury. Any confusion from his testimony is because of a "testimonial mishap," not perjury. *See Bronston* v. *United States,* 409 U.S. 352, 358 (1973) (discussing distinction between testimonial mishap and perjury).

Choina argues that even if Trappey committed perjury, the verdict should not have been reversed. He contends that DuPont became aware of the printout error before Trappey testified. Yet, rather than seek a continuance to try and obtain the correct data, DuPont chose to ambush Trappey with the mistake, trying to make him look like a liar in front of the jury. Choina asserts that only after this strategy backfired to the tune of $11.3 million did DuPont claim that the verdict should be set aside. Choina maintains that Rule 60(b)(6) is inappropriate where a party made a "voluntary, deliberate, free, untrammeled choice." *Ackermann* v. *United States,* 304 U.S. 193, 198-201 (1950). Choina argues that DuPont took a gamble and lost. A verdict should not be set aside after a party makes a deliberate, although ultimately unsuccessful, choice.

We agree with DuPont that the district court's grant of the Rule 60(b)(6) motion should be affirmed. The district court's perjury finding is a factfinding, which we review only for clear error. *See Accura Systems, Inc.* v. *Watkins Motor Lines, Inc.*, 98 F.3d 874, 876 (5th Cir. 1996). There is ample evidence to support the district court's finding of perjury. First, only nine of the 36 pages of data Trappey gave were original, while the rest were duplications. Second, Trappey testified that the data sheets represented information obtained from over 500 respondents. Only after being confronted did be correct himself and say only 100 interviews were completed. Third, Trappey never explained to the jury the

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But, I mean, again as a—I was surprised, because the market research people whom you contact are not—I mean they are not part of—they don't constitute anything. Its the sample that responds.

difference between interviews and completed interviews. This shows that he intended the jury to think he received data from over 500 companies. Finally, Trappey's comments to Rosha indicate that he knew he misled the jury when he said he performed over 500 interviews.

It is likely that Trappey is correct in distinguishing between interviews and completed interviews. That is not the issue, though. What matters is that Trappey intentionally misled the jury, leading it to think that he had actually received information from 500 people, when he had only received information from 100 people. The district court determined that Trappey intentionally misled the jury regarding the number of interviews conducted. The district court observed the second trial, as well as the Rule 60(b) hearing, and was in a better position to determine the credibility of the witnesses and the harmful effect of Trappey's testimony. After reviewing the record, we cannot say that the district court's finding of perjury was clearly erroneous.

Choina argues that the district court erred in granting Rule 60(b) relief because DuPont failed to seek a continuance after learning of Trappey's perjury. We disagree. Rule 60(b)(6) motions are appropriate to remedy fraud by a third-party witness.[4] 11 WRIGHT, MILLER & KANE, FEDERAL PRACTICE & PROCEDURE § 2864 at 352-53 (1995) ("WRIGHT & MILLER"). The Supreme Court has stated that Rule 60(b)(6) relief is appropriate only in extraordinary circumstances. *Ackermann*, 304 U.S. at 199; *see also Batts* v. *Tow-Motor Forklift Co.*, 66 F.3d 743, 747 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 1851 (1996). We have said that the district court's Rule 60(b)(6) powers do not provide relief when a party could have, but did not, present evidence at trial. *See Gov-*

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4 Rule 60(b)(3) allows relief from judgments when there is fraud by a party. Wright and Miller have noted that Rule 60(b)(6) provides similar relief when, as in the instant case, the fraud is not by a party but by a third-party witness. WRIGHT & MILLER § 2864 at 353 n.8.

ernment Financial Services v. *Peyton Place, Inc.*, 62 F.3d 767, 774 (5th Cir. 1995) ("[W]e have expressly held that a district court's equitable powers under section (b)(6) do not extend to considering evidence that could have been presented at trial."); *United States* v. *329.73 Acres of Land*, 695 F.2d 922, 926 (5th Cir. 1983) ("This clause of the Rule provides a grand reservoir of equitable power to do justice in a particular case, but that well is not tapped by a request to present evidence that could have been discovered and presented at trial through the exercise of due diligence.") (internal quotation omitted); WRIGHT & MILLER § 2864 at 370 (Rule 60(b)(6) motion should be denied when "the movant made a fair and deliberate choice at some earlier time not to move for relief.").

After reviewing the record, we are convinced that DuPont took appropriate steps after learning of Trappey's perjury. DuPont learned that the computer printout contained duplications only hours before Trappey testified. Rather than seeking a continuance, DuPont chose to vigorously cross-examine Trappey on the duplications. Given the circumstances of this case, we cannot say that DuPont waived its right to Rule 60(b)(6) relief by not seeking a continuance and instead cross-examining Trappey about his perjury. DuPont's choice to try and expose the perjury and hope the jury disbelieved the witness is not the complete failure to present evidence of which the *Peyton Place* Court spoke. *Peyton Place*, 62 F.3d at 774.

Sanctions

The district court sanctioned Choina by (1) tolling prejudgment interest between the second and third trials and (2) awarding DuPont reasonable costs incurred because of Choina's new marketing expert. Choina argues that the prejudgment interest tolling was inappropriate because it gave DuPont a windfall. During the time between the two trials, DuPont kept the money it ultimately paid Choina, earning interest the whole time.

Any increase in prejudgment interest because of the delay did not harm DuPont, because the interest was money it would not have earned but for the delay. Choina contends that the award of costs is improper because it is not justified under 28 U.S.C. § 1920 (the costs statute) or Rule 54.

A district court has inherent power "to manage [its] own affairs so as to achieve the orderly and expeditious disposition of cases." *Natural Gas Pipeline Co.* v. *Energy Gathering, Inc.*, 2 F.3d 1397, 1406 (5th Cir. 1993) (quoting *Link* v. *Wabash R. Co.*, 370 U.S. 626, 630 (1962)), *cert. denied*, 510 U.S. 1073 (1994). We have recognized that district courts' inherent power "is not a broad reservoir of power, . . . but a limited source . . . ." *NASCO, Inc.* v. *Calcasieu Television & Radio, Inc.*, 894 F.2d 696, 702 (5th Cir. 1990), *quoted with approval and aff'd*, 501 U.S. 32, 42 (1991). Nonetheless, we are persuaded that the district court did not abuse its discretion in sanctioning Choina under its inherent power by tolling the running of pre-judgment interest and awarding DuPont its costs incurred because of Choina's new marketing expert.

Mitigation of Damages

In its charge in the third trial, the district court asked the jury whether Choina failed to mitigate his damages. The jury answered in the affirmative, lowering the verdict by 10%. Choina argues that the district court erred in including an instruction and interrogatory on mitigation, because there is no evidence in the record of failure to mitigate.

Choina also complains that the district court erred in using a comparative fault method of determining mitigation. Specifically the district court inquired as to "what percentage [did the jury] find that the damages . . . were caused by the plaintiff's failure to mitigate his damages. . . ." The proper inquiry, Choina contends, is by

what dollar amount he failed to mitigate. Choina cites no law for this proposition.

When reviewing jury instructions, we examine whether the charge as a whole creates substantial doubt as to whether the jury has been properly guided in its deliberations. *See Davis* v. *Avondale Indus., Inc.*, 975 F.2d 169, 174-75 (5th Cir. 1992). After reviewing the record, we have no such doubt. DuPont presented evidence of Choina's failure to mitigate damages, and under Louisiana law contract damages are to be reduced for failure to mitigate. *See Stanley* v. *Guy*, 442 So.2d 579, 581 (La. Ct. App. 1983).

Likewise, the district court did not err in using a percentage rather than a dollar amount in its failure to mitigate interrogatory. Under Louisiana law, failure to mitigate is the equivalent of comparative fault. *See Thibaut* v. *Thibaut*, 607 So.2d 587, 614 (La. Ct. App. 1992) (Gonzales, J., concurring) ("Mitigation of damages is the functional equivalent of comparative fault within the framework of a damage claim for breach of contract."). Therefore, a percentage decrease in recovery is not inappropriate.

Additionally, once the jury has found damages, there is no real difference between asking that the jury find a specific dollar amount as opposed to a percentage of a known amount. After the jury had determined that damages were $140,000, its finding that the damages resulting from failure to mitigate were 10% of $140,000 was the same as the jury finding that the damages resulting from the failure to mitigate were $14,000. The only difference is who performs the mathematical calculation, the judge or the jury.

CONCLUSION

After reviewing the record and briefs, we are convinced that the district court committed no reversible error. Accordingly, the judgment of the district court is AFFIRMED.

Appendix B

[Filed August 4, 1997]

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-30420

MAC SALES INC., ET AL,

Plaintiffs,

KENNETH P. CHOINA, SR.,

Plaintiff-Appellant,

VERSUS

E. I. DUPONT DE NEMOURS, AND COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
(89-CV-4571-N)

ON PETITION FOR REHEARING

Before REYNALDO G. GARZA, EMILIO M. GARZA, and DeMOSS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED

ENTERED FOR THE COURT
/s/ HAROLD R DEMOSS JR.
HAROLD R DEMOSS JR
United States Circuit Judge

Appendix C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MAC SALES, INC., ET AL,
Plaintiffs,

v.

E.I. DUPONT DE NEMOURS & CO.,
Defendant.

Civil Action No. 89-4571
Section "N"
New Orleans, Louisiana
July 28, 1995

MOTION TO AMEND JUDGMENT
BEFORE THE HONORABLE EDITH BROWN CLEMENT,
UNITED STATES JUDGE

* * * * *

THE COURT: All right. Having sat through this trial, I must react to the apparent misrepresentation perpetrated by Mr. Trappey. The testimony of Rahul Rosha provides the only reasonable explanation for Mr. Trappey's failure to turn over the complete data set in response to the pre-trial subpoena duces tecum. That explanation is that no such data set ever existed.

The now offered distinction between "interviews" and "completed interviews" and "calls" flies in the face of the testimony. Mr. Trappey's post-trial submission, his affidavit, and the testimony today is nothing but an attempt to extricate himself from the hole created by his perjurous testimony.

Mr. Trappey's testimony today highlights the misrepresentation upon which the jury relied. The evidence that

Mr. Trappey falsified his data and his report and that he perjured himself is clear and convincing.

While his methodology may have been correct, he misrepresented his methodology to the jury. While this fraud was not committed with the complicity of Plaintiff or his Counsel, the court nevertheless concludes that Plaintiff has prevailed in this case because of Mr. Trappey's fraudulent testimony;

That not only is the Defendant injured in this event, but the entire judicial system and the Court suffers as a result.

The Court will not allow a verdict founded upon unmitigated fraud to stand.

Mr. Trappey's testimony provided the entire basis for the jury's award. Without Mr. Trappey, there was no evidence of a market for Plaintiff's product. There is no basis for Dr. Wood's testimony.

This case is extraordinary, in that the sole evidence supporting a multi-million dollar verdict is the clearly fraudulent testimony of an expert witness who supplied Defense counsel with fraudulent documents that prevented Defendant from fully presenting its case.

Allowing this verdict to stand would cause substantial injustice. The Court will not sit idly by and allow Mr. Trappey to visit this injustice on the Defendant or the Court. Accordingly, pursuant to Rule 60(b) 6), the Court grants Defendant's motion and the judgment entered in accordance with the jury's answers is set aside.

The case will be tried again. No further discovery may be conducted. No additions to the pre-trial order will be allowed. The case will be tried on an expedited basis. Defendant will be allowed to call Dr. Cook and Mr. Rosha as impeachment witnesses. Counsel are instructed to meet with my courtroom deputy immediately following this proceeding to select a new trial date.

As to Mr. Trappey, the Plaintiffs may call him as a witness at the upcoming trial. The Court remains concerned about and convinced of the perjurous nature of his testimony. The United States Attorney has been advised of the Court's concern. The Court will invite the United States Attorney to attend the re-trial of this matter. Any witness who perjures himself will be referred to the United States Attorney for prosecution.

Counsel are put on notice that this Court does not tolerate perjury, it will not tolerate subordination of perjury.

That concludes the docket for this morning.

(Whereupon, the hearing was concluded)